United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1011

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P/S

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Respondent-Appellee,

-against-

JOSEPH MAGNANO, et al.,
Defendants-Appellants.

On Appeal From The United States District Court for the Southern District of New York

BRIEF FOR APPELLANTS MAGNANO AND PALATTA

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BRIEF FOR APPELLANTS MAGNANO AND PALATTA

QUESTIONS PRESENTED

1. Whether the trial court's instructions on proof beyond a reasonable doubt and accomplice testimony, objected to by counsel below, were erroneous; and whether those errors can be disregarded as harmless in the circumstances of this case.

2. Whether the trial court's refusal to grant an evidentiary hearing to determine if a new trial should be ordered, on the basis of a belated government disclosure of Brady v Maryland (323 U.S. 83, 1963) material, was clearly erroneous.

3. Whether the trial court erred in refusing to permit the defense to introduce proffered government records in support of its position that the government witnesses had not disclosed their true sources of heroin and had the motive to fabricate the story told to

the prosecution prior to their arrests; and whether the court further erred in refusing to charge the jury pursuant to Dyer v MacDougall, 201 F2d 265, 269 (2nd Cir., 1952), on the inferences which can be drawn from false testimony.

4. Whether the trial court erred in permitting introduction of evidence of sustained prior narcotics activity of the appellants, over objection, and whether the error can be disregarded as harmless.

5. Whether the government failed to adduce evidence linking the several transactions testified to at trial into a single, overall conspiracy.

6. Whether the trial court erred in permitting into evidence against all defendants, one-half million dollars seized from a co-defendant a year after the conspiracy charged in the indictment terminated, and without any proof that the co-defendant's possession of the money was connected to the conspiracy charged in the indictment.

STATEMENT PURSUANT TO RULE 28

A. Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Cooper, S.D.J.) rendered December 3, 1975, convicting the appellants Joseph Magnano and Frank Palatta, after jury trial, of four counts of violation of the narcotics laws (21 U.S.C. Sections 812, 841(a)(1), 841(b)(1)(A) and 846), and sentencing them to thirty-year terms of imprisonment.

Both appellants are presently incarcerated pursuant to the judgment.*/

B. Statement of Facts

Magnano and Palatta were charged, together with eighteen other persons, in a seventeen-count indictment alleging a conspiracy to distribute and possess narcotics, and substantive acts. Eight defendants were tried together, and seven convicted of conspiracy and various substantive counts.

The defendants on trial, in addition to Magnano and Palatta, were Richard Bolella, an alleged partner of Magnano and Palatta; Anthony DeLutro and Anthony Soldano, from whom Perna and Verzino testified they received heroin in November of 1973 and January of 1974; Frank Lucas and John Gywnn, alleged customers of Perna's and Verzino's; and William Chapman, who Perna testified introduced him to various customers.

The entire case against the appellants Magnano and Palatta is contained in the testimony of two government witnesses, Mario Perna and Anthony Verzino. They testified to a course of dealings with Palatta and Magnano over a seven- or eight-month period involving the purchase from them of large quantities of heroin and the payment to them of substantial amounts of money.

Perna, who was released from Atlanta Penitentiary a year before Verzino, was the lead-off witness. He testified that he

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*/ References to appellants' appendix are prefaced 'A' and references to the original record are prefaced 'T'.

decided to re-enter the narcotics trade in February of 1973, together with Ernest Malizia. (T.453-) He told of various meetings with Magnano and Palatta*/ from April to August of 1973. According to Perna, during this period he received perhaps eight deliveries of heroin from "Skooch" which were arranged through Palatta, Magnano and "Donnie Boy", and gave them perhaps four or five hundred thousand dollars in exchange. (T.630-31)

Though Perna claimed to recall the incriminating conversations at the April to August meetings, he could not recall dates and times (T.580, 581, 582, 585-6, 589, 633) or even amounts of money. (T.578, 583, 587-88, 626) Typical of his testimony is the incident where he related how, at a time he couldn't remember, he had to see Palatta. He went to a club to look for him, had a conversation with a fellow named Charlie, which he purported to report word-for-word, got a message to Palatta through a procedure arranged for emergencies, and then couldn't state at the trial why he arranged the emergency meeting because he couldn't remember. (T.637-38)

Verzino was still in custody during this period. He joined the Verzino-Malizia partnership in September of 1973. Once he and Perna both began to testify concerning the same events, then contradictions and discrepancies between the accounts of their claimed dealings with Magnano and Palatta from September through the winter of 1973 developed.

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*/ and co-defendant Richard Bolella, as well as other persons not on trial whom the government alleged were associated with Magnano and Palatta, including Louis Macchiarola ("Red Hot"), Michael Carbone ("Mikey"), Dominic Tufaro ("Donnie Boy"), Frank Ferraro ("Skooch"), and Carmine Magiasso ("Charlie").

Perna testified that even before Verzino was released from Atlanta Penitentiary, Palatta and Magnano told him they did not want him to tell Verzino that he had seen them, because Verzino "was a gossip and a big mouth, and we were afraid if we were to tell him anything in relation to our business with them, that he would go around telling other people". (T.634-35) Perna testified he did not tell Verzino anything about Palatta and Magnano until after he decided to take Verzino into the partnership at their second meeting, when it became necessary to make the disclosure. (T.647, 649)

Verzino testified that at the first meeting, even before it was clear whether he would become a partner, Perna told him who their sources were and how to contact them. (T.1848-49) Verzino further testified that he saw Palatta before the second meeting with Perna and Malizia, and that Palatta not only discussed in detail his dealings with Perna, but gave Verzino a complete rundown of Palatta's own business, including the names of his partners. (T.1852-56)*/

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*/ Perna and Verzino even contradicted one another on how the partnership came into being. Perna said there were two meetings in Verzino's apartment before this came to pass. (T.640, 644-45) Verzino testified one meeting occurred in front of the house, and the other at the Coney Island Hotel. (T.1845, 1871) Perna said Verzino called from a restaurant wanting money, and at the first meeting demanded $10,000. (T.641, 643) Verzino said nothing about the phone call and stated Malizia volunteered to give him $3,000 at the first meeting and later offered $10,000 to cover his moving expenses. (T.1847, 1873)

Perna testified Verzino was offered the partnership at the second meeting, only after Malizia convinced him to take Verzino in. (T.644-645) Verzino testified that early on in the first meeting, they offered the partnership, which he said he wanted to think over. (T.1847-48) (Cont'd on next page.)

Perna testified that in October of 1973, he was introduced to Richard Bolella -- the co-defendant claimed by Perna and Verzino to be Palatta's and Magnano's partner -- at the Cross Country Shopping Center. Perna stated that Malizia, Verzino and Bolella were sitting in V -ino's car, which was parked behind Gimbel's. He could recall exactly where each person was sitting in the car and purported to give a word-for-word account of the conversation, which centered on Verzino's asking Bolella for a price reduction.**/ (T.670-673)

However, the only discussion about price reduction Verzino testified to allegedly occurred, not with Bolella, but between himself, Perna and Malizia, with Palatta, Donnie Boy and Skooch at a restaurant called the Adventurers' Inn. Verzino also gave what purported to be a detailed narrative of this conversation. (T.1905-1908)

Moreover, Verzino testified that he was at only three meetings where Bolella was present. (T.1927-28) At two of those meetings, he testified that neither Perna nor Malizia was present. (T.1915; 1923-24)

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*/ (cont'd from prior page)
Perna testified they gave Verzino a $400,000 interest in the $1,200,000 value of their business as it existed in September, 1973. (T.954-55) Verzino testified he got no part of the monies from before September, but only a one/third interest in future profits. (T.1874) Perna testified that he and Malizia told Verzino they would "take down" $70,000 for part expenses. (T.646) Verzino testified they had told him they would take $180,000. (T.1874)

**/ "Verzino asked [Bolella], 'What are you going to do about it, Dickie? Will you be able to get this reduction for us? We are paying a lot of money for these goods and for the quality of the goods it really isn't worth it.' Dickie at that time said that he felt pretty certain that he could get a reduction for us, that he would speak to his partners and he should have an answer for us within the next couple of days." (T.672)

At the third, Malizia was present but he could not recall Perna being there. (T.1928) He specifically was asked to give a complete account of the meetings involving Bolella, and it is clear from his testimony that at none of them did he claim that a price reduction was even mentioned. (T.1916-23; 1924-27; 1928-31)

The accounts which Perna and Verzino gave of their joint dealings with Magnano and Palatta in November were also at substantial odds with one another.

Perna testified to a conversation with Malizia, Verzino, Magnano and Palatta at the Cross Country Shopping Center in late November, around Thanksgiving. (T.755) Perna claimed that Palatta told him his group was running short of goods. (T.757) When Malizia demanded more goods, Palatta told him they could expect only a limited amount because they were having trouble with their suppliers and also were obligated to give preference to another customer. (T.757-760) Perna claimed that they received twelve packages of narcotics from Skooch a few days after this meeting. (T.770)

Verzino testified that in late November, early December, he, Malizia and Perna met Palatta and Magnano twice at the Cross Country Shopping Center to complain about the quality of the goods they had received and to ask for pure heroin. (T.1928-30; 1994-1999) At one of these meetings, Verzino said Palatta asked them to take all the cut goods he had on hand because Palatta's other customer had been arrested, and Palatta was now dependent on them to take all his merchandise. (T.1928-31) According to Verzino's testimony, Malizia refused to buy more merchandise from Magnano and Palatta at both

meetings, because, as they could not supply him with pure heroin, Malizia and his partner had gotten another source for pure, and it was no longer profitable to take cut goods from Magnano and Palatta. (T.1931,2000)

The bulk of the government's proof at trial from other witnesses served only to establish the guilt of Perna and Verzino in the narcotics traffic for which Magnano and Palatta now stand convicted.*/ The narcotics introduced into evidence had been found in the possession of the two government witnesses, Perna and Verzino; the sales of large amounts of narcotics testified to by D.E.A. agents were made by Perna; the incriminating conversations, taped and introduced by the government, were between Perna and an undercover agent; and the confessions obtained by the government were those made by Perna and Verzino.

The central issue at trial, as characterized by both sides and the court, was the issue of credibility.**/ All recognized that the guilt of Magnano and Palatta was established if -- and only if -- the jury was willing to accept the testimony of

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*/ The proof which remained was directed to establishing the involvement of John Gwynn.

**/ See for example, the summation by counsel for Palatta:

> "Has the government established by reliable, credible, trustworthy proof, the responsibility of Frank Palatta beyond a reasonable doubt? Or, on the other hand . . . if you would hesitate to take their word . . . if you would hesitate to rely on them . . . then you must entertain a reasonable doubt in this case. It is as simple as that." (T.3797)

See, also, summation for Magnano (T.2848); the government's summation, devoted entirely to convincing the jury that Perna and Verzino were telling the truth (see T.3688, et seq.); and the court's charge. (T.4105, A.92)

Perna and Verzino as credible beyond a reasonable doubt.*/

The facts as to the credibility of Perna and Verzino were the following:

According to the testimony of Special Agent Bradley, Mario Perna had been arrested on February 3, 1974, in New Jersey immediately after he transferred eight kilos of heroin to Bradley in exchange for $200,000. (T.1487-88) Prior to this sale, Perna had made four other sales of heroin to Bradley over a two-month period, each involving a transfer of one-eighth kilo for a price of $4,000. (T.1449; 1455; 1458-59; 1473)

During the time he was selling heroin to Agent Bradley, Perna had also hired Joseph Condella, an informant working with and reporting to Bradley, to kill his partner, Verzino. The conversation where Perna asked the informant to kill Verzino was taped and introduced into evidence. (T.1465-72) Perna then took Agent Bradley and the informant Condella to various places where Verzino could be found and murdered (T.1478-79), and supplied Condella with the weapons to effect the murder. (T.1486)

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*/ The government claimed that Perna and Verzino were corroborated by Malizia and Caravella, "who [are] not here" (T.3726-27); by Malizia's documents, over objection that no one had explained them and it was improper for the government to do so (T.3730-37); and by documents taken from Perna and Verzino having notations 'owe F.B. 333' and "Nazone almost 9" which meant that they owed Palatta $333,000 and had 8-3/4 kilos of drugs from Palatta and Magnano on hand when arrested. (T.3749; see also T.855 and T.2095 where Perna and Verzino testified on what the notations meant.)

In short, the government introduced evidence proving that Perna, when arrested in New Jersey, faced almost certain conviction for at least six major criminal acts, each of which was fully documented and carried a sufficiently severe penalty to keep him behind bars until his dotage.*/

On February 25, 1974, three weeks after Perna's arrest, a search warrant was executed on his and Verzino's stash of narcotics, yielding twenty-six pounds of heroin. As a result, in addition to the federal case, Perna was indicted in New York State Supreme Court for various narcotic felonies and faced mandatory fifteen to twenty-five years to life sentences in that case upon conviction. (T.1004)

In September of 1974, Perna escaped from the Federal Correctional Institution at West Street, after bribing a federal officer, adding still more seriously punishable crimes to his already formidable list. (T.918-19)

Cross-examination showed that Perna had nothing in his background to mitigate the impact of these crimes. He had been a drug dealer his entire life. (T.1016) He still owed two-and-one-half years on a seven-and-one-half year prison term meted out in 1958 for narcotics violations. (T.970) He was under indictment in Florida for conspiracy to import two hundred kilos of cocaine from South America (T.962) and had pled guilty after attempts to bribe the witnesses against him in that case had failed. (T 1392) He

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*/ Perna had been told that if he did not co-operate, he would spend the rest of his life in prison. (T.1298)

had been involved in a conspiracy to import 450 pounds of heroin from France while a prisoner in Atlanta Penitentiary. (T.955)

Perna was forced to admit that he was concerned with how much time he would have to serve on the federal cases (T.98-99); that he did not want to do any time on the state charges and wanted the federal prosecutors to convince the state prosecutors "to cut (him) loose from that state case . . . " (T.1004-05); and that he also wanted to insure that his wife, who had been an active participant in his various narcotic ventures, would not be prosecuted by the government. (T.1040-41)

Perna's track record for truth telling was no better than his ability to conform his behavior to the law. He had committed perjury in an affidavit filed in federal court because he had been promised $50,000 for his false statement. (T.1052, 1368) Not only had he attempted to bribe (T.1392) and kill in order to save himself from jail (T.1106), but he admitted he would lie to protect his friends, and would be prepared to lie against people he had no interest in, in order to help himself. (T.1121-22)

Verzino was arrested in February of 1974, after having made four heroin sales to a New York Police Department informant between November, 1973, and February, 1974. (T.2326) Incriminating conversations between Verzino and the informant had been taped, and based on this information and extensive police surveillance during the four-month period, the location of Verzino's narcotics "stash" was discovered. On February 25, 1974, when three city police officers arrested Verzino, pursuant to a search warrant, they

found twenty-six pounds of heroin in the stash. (T.2094, 1842). He was charged with possession and sales of narcotics (T.1842) Conviction on any one of the counts against Verzino carried a fifteen to twenty-five year to life penalty in state court.*/

Verzino also owed four years on a federal sentence from which he was then on parole (T.2396-97); and had been heavily involved in the 200-kilo Atlanta Prison heroin conspiracy, where he knew he faced a thirty-year sentence if indicted (T.2179)

Verzino admitted that even while in federal prison serving a twelve-year sentence for narcotics violation, he had no hesitation in committing a new narcotics crime as long as he could profit from it. (T.2157) Just as incarceration was no deterrent for him, neither was a sworn oath. He admitted he had no hesitation about lying under oath as long as he thought he could profit from misleading the court. (T.2158) He also admitted that he had discussed and his lawyer had prepared a submission to the District Director of Internal Revenue for a $30,000 award for his testimony in this case. (T.2191-96)

Like Perna, Verzino had unsuccessfully plotted escape and murder of witnesses before agreeing to become a co-operating witness

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*/ The sale of a mixture with an aggregate weight of one or more ounces containing a narcotic drug is an A-1 felony in New York. PL #220.43(1). Upon conviction of an A-1 felony, the court must impose a term of imprisonment of at least fifteen years, with discretion to increase that mandatory minimum to up to twenty-five years. PL #70.00(3)(a). In addition, a maximum term of life imprisonment must be imposed. PL #70.00(2)(a). Thus, one convicted of an A-1 felony must serve at a minimum fifteen (or any amount set by the court up to twenty-five) years in custody before becoming eligible to meet the parole board.

to "ameliorate his situation". (T.2182, 2335, 2297-2301; 2204)

Verzino had hoped that if he "co-operated in a proper manner", certain things would be done for him, and that there was a possibility he "could walk out of this thing and never have to go back to jail again". (T.2185, 2491) He was able to obtain a commitment that he would not be indicted for the 200-kilo Atlanta conspiracy as long as he testified for the government (T.2178) and to achieve a plea in state court where it was possible, with a good word from the prosecution, for him to make parole in as little as four months. (T.2175, 2202-03)

Verzino's wife had played an active role in his various narcotics ventures. Another part of the price Verzino admitted extracting for his testimony was that the charges against her would be dropped by the state and federal officials. (T.2189, 2194)

Because of the depth of the impeaching material against Perna and Verzino, and the government's total dependence upon this testimony to convict Magnano and Palatta, counsel for them joined in requests for certain accomplice instructions and for instructions on reasonable doubt (see infra, Point I).* The correctness of the instructions actually given, in light of those requests and the exceptions taken, is the first issue raised on this appeal. (Point I, infra)

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* Before the trial began, the court ruled that all motions, rulings and objections inured to the benefit of all defendants similarly situated. (T.374)

The government took the position at trial that Verzino had co-operated fully and truthfully with federal authorities once he was secure in federal custody, and one his wife was in protective custody. (T.2504-05) Despite this, the government was forced to concede that at this same time, Verzino continued to conceal the identity of his friends who participated in the Atlanta heroin case, and was unwilling to implicate them until he learned that they had "betrayed his friendship" by planning his murder with Perna. (T.3642)

The goverment had argued that Verzino's lies about the Atlanta case were unimportant as Perna co-operated in full when he was recaptured: "a short time after he was recaptured, a week or two later, was revealing all at that time". (T.3758-59) However, there was material in existence (Ex. 1-3, annexed to motion to vacate verdict, A.146-167) establishing that Perna, like Verzino, had concealed his accomplices in the West Street escape at the same time the government claimed that -- for the first time in his life -- he was co-operating in full and telling the truth.*/ These documents were not turned over to the defense until six weeks after the verdict. We argue in Point III, infra, that the trial court's denial of a hearing on counsel's motions to set asidd the verdict on this basis was clearly erroneous.

A main thrust of the defense below was its attempt to establish that Perna and Verzino were still concealing their actual

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*/ In summation the government argued:

> ". . . these people are acting for the first time in their lives, since they began to cooperate, in full, in good faith they are acting, they are telling the truth because they know the truth is the only way out for them . . ." (T.3714)

sources of heroin and had implicated Magnano and Palatta as "throw-aways" to save their own skins. The foundation for this argument was attempted through questioning to demonstrate that Perna and Verzino had access to overseas connections for narcotics and had made statements that these were the sources of their drugs during the period of the conspiracy; and to show that after Malizia was arrested in December of 1973, Perna and Verzino, concerned that they would be apprehended, planned to give up other persons than their actual suppliers.

Through cross-examination, counsel was able to obtain admissions that Perna and Verzino had access to foreign sources of large quantities of drugs during the Atlanta heroin conspiracy and Perna's Florida cocaine conspiracy. (T.963-66; 1034-39; 2157-65; 2197-99; 2224-25; 2360-64); and that Verzino had told the state narcotics prosecutor, at a time when Verzino was trying to impress him with his truthfulness, that his source for the heroin found in his possession was a French courier. (T.2212-18; 2275-77; 2280-85) Counsel also established that Perna took Verzino into the partnership despite his dislike for Verzino, and gave him a retroactive share, though Perna denied this was done because Perna and Malizia were using Verzino's French sources to secure their heroin. (T.950-954)*/ Although Verzino admitted he had the ability to contact a French connection when he left Atlanta, he denied that he actually

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*/ As stated above, Verzino had contradicted Perna and disclaimed Perna's testimony about the retroactive share. (T.2221, 2226-36)

did so. (T.2162-65) Defense counsel was able to secure some admissions from Verzino, that during the period of the conspiracy, Verzino told a co-conspirator, James Culhane, that Verzino had scored heavily with his French connection, but Verzino attempted throughout the questioning to minimize these discussions with Culhane. (T.2285-95; 2561; 2562-2587)

Counsel had also obtained admissions that after their partner Malizia was arrested in December, 1973, Perna and Verzino were worried about going back to jail. (T.1011, 2303) However, Verzino and Perna denied that they had planned, at that time, to sell names to the prosecutor in order to avoid jail if arrested and to maintain their true sources intact. (T.1012-1014; 2302-03)

The defense was precluded from introducing government reports wherein the government informant Culhane was reported as stating that Verzino told him several times that he obtained the heroin from France and in which the informant Condella stated that Perna told him on a number of occasions that he was afraid of police surveillance after Malizia's arrest.*/ The trial court also refused to give a requested charge on the negative inferences which the jury could draw from testimony found to be false, pursuant to Dyer v MacDougall, 201 F2d 265 (2nd Cir., 1952). See Point III, infra.

The government also introduced prior crimes evidence into the case, over continuous defense objection, beginning before the trial commenced. (T.40)

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*/ This evidence was also relevant to establish counsel's claim that Perna's motive to falsify existed prior to his own arrest -- which occurred six weeks after Malizia's -- and hence that Perna's statement in February, 1974, to agent Boccia naming Palatta and Magnano, introduced by the government as a prior consistent statement arising before a motive to falsify existed was nothing of the sort, but was merely a first step in executing the Perna Verzino bail-out plan, which existed from the time of Malizia's arrest. (Statement introduced at T.2857-60; offer of proof at T.1810-17)

Verzino was allowed to testify that, some twelve years before the conspiracy charged in the indictment, he was in the narcotics racket daily, and he bought and sold heroin in multi-kilo quantities from Palatta and Magnano.*/ (T.1858-1866) Verzino claimed his principal source for the heroin he bought and sold from 1959 to the mid-1960's was Palatta and Magnano. (T.1866) He testified he introduced Palatta and Bolella to a connection named Joe Ragone and that Bolella told him they did business with Ragone. (T.1867-69) Verzino testified that he and Magnano sold Palatta's heroin to a customer named Frank Ross. (T.1870) Verzino was also permitted to testify, over objection and motion for a mistrial, that Magnano introduced him to heroin in 1940. (T.2574-76)

Verzino's testimony was bolstered by Peter Scrocca, a D.E.A. agent (T.2716-24), again over a mistrial motion, despite specific prior admonition by the trial judge that the government was to refrain from doing so. (T.1978 et seq.) Before Scrocca testified, the trial court had recognized that the prior crime testimony already introduced showed a sustained course of conduct "even more incriminating than the very testimony dealing with the indictment . . ." (T.1979) The court expressed substantial doubt that the jury could follow its cautionary instruction because of the heavy weight of this evidence (T.1981-82), and warned the prosecutor against any further attempt to embellish the record in this regard (T.2630-35)

The government's theory in introducing the prior crimes was "to show a course or pattern of conduct in which these defendants engaged, in addition to showing a common plan on the part of these

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*/ He also named Carbone and Macchiarola, two of the severed co-defendants whom the government claimed were partners with Palatta and Magnano. (T.1865)

defendants to violate the federal narcotics laws" of which the conspiracy charged in the indictment was only a small part. (T.713, 716, 606-07, 722, 1960-65) The defense opposed introduction, arguing that the government's offer to prove such a continuing pattern of criminal behavior was merely an offer to prove propensity, dressed up in other language. (T.705, 718)

The trial court rejected the government's theory but permitted the evidence anyway "to show the background and development of conspiracy" (T.723) -- this despite the fact that Perna, who made the initial contact with Magnano and Palatta, testified that he had no prior criminal -- or other -- association with Palatta and Magnano before he met them, and had done business with them on a credit basis for a full six months before Verzino even joined the conspiracy.*

Although the court deemed the evidence admissible only to show background, the government, nonetheless, argued in summation, over objection and motion for a mistrial:

> "We have never disputed in this case from the beginning until now that Perna and Verzino are not of a bad background. But who, members of the jury, do major narcotics and heroin salesmen associate with? Who do they associate with? With others of the same ilk This is why this association is important in this case. Just as Verzino and Perna sold heroin in the past, this association with these other people corroborates the fact that they are of the same ilk . . .". (T.3751-52)

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* Perna testified that he and Malizia made contact with Palatta through a man named Sally Moon (T.456-60); that he had never met Palatta before (T.462); and that Palatta indicated a willingness to do business with them from their first meeting. (T.465) Perna testified that for the six months before Verzino joined the partnership, he did continuous narcotics business with Palatta and Magnano on a credit basis. (T.465-68)

The appellants' counsel also opposed the introduction of $585,000 in cash, found almost a year after the arrest of Malizia, Perna and Verzino, in the home of a co-defendant, Frank Lucas, on the ground that there was no evidence connecting it to the conspiracy. See Point VI, infra.

Palatta and Magnano did not take the stand or offer witnesses. Two other defendants, DeLutro and Gwynn, did take the stand and DeLutro called other witnesses.

The jury deliberated three days before it returned a verdict of guilty against all defendants except William Chapman.

POINT I

The Trial Court's Instructions On Proof Beyond A Reasonable Doubt And Accomplice Testimony, Objected To Below, Were Erroneous And Cannot Be Disregarded As Harmless Error In The Circumstances Of This Case.

By all the traditional tests of credibility, Perna and Verzino were witnesses whom the jury could easily have rejected.

Both were major narcotics offenders, who had been arrested in circumstances where conviction after trial was assured. (supra, pp. 9 and 11-12) Each man's wife was heavily involved in the narcotics traffic, and also faced conviction for serious crimes. (supra, pp. 11 and 13) Both Perna and Verzino did not want to remain in jail for the rest of their lives, and also did not want their wives to be prosecuted. (supra, pp. 10-11 and 13) Each had resorted to desperate and unsuccessful measures to avoid prosecution. (supra, pp. 10-11 and 12) Neither man had been over-fastidious about truth-telling in the past. (supra, pp. 11 and 12) Even while incarcerated, neither man was sufficiently deterred to conform his behavior to the law. (supra, pp. 11 and 12)

Both Perna and Verzino were men who weighed their actions in terms of the profit to themselves, who were not concerned about how they accomplished any result they wished to achieve, and who had unsuccessfully plotted escape and murder of witnesses before turning to more conventional means of self-help to ameliorate their own desperate situations. Both believed that they would be incarcerated for

the rest of their lives if they did not testify for the government.

If properly instructed, the jury may well have found that they would hesitate to act upon the word of such men in the important affairs of their own lives, not only because of their demonstrated history of lies and deceit, but because of their substantial personal interest in the outcome of the trial.

We submit that the trial court's reasonable doubt instruction and its instruction on accomplice credibility, both given over proper request and exception, were erroneous in this case, and that such fundamental errors cannot be disregarded as harmless as to Magnano and Palatta. Every shred of evidence against them came from the mouths of Perna and Verzino.*/ They had a right to have the jury properly assess the only evidence establishing their guilt under proper instructions on the inherently suspect motives of the witnesses testifying against them and on the high standard of proof the law demands before a guilty verdict can be returned.

(a) The reasonable doubt instruction

For at least twenty-five years, courts in this and other circuits -- following the lead of the Supreme Court -- have continually cautioned district courts to charge that a reasonable doubt

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*/ Even the notes the government claimed corroborated their testimony (see supra, p. 9, f.n.) depended upon the explanations and interpretations of them by Perna and Verzino. As was brought out on cross, they had written the notes, and only they could presume to understand and convey what the various symbols meant. (See T.1298) Thus, to be convinced that the symbols on the notes meant what Perna and Verzino said they did, the jury had to accept their testimony that, like Humpty Dumpty, "When I use a word . . . it means just what I choose it to mean -- neither more nor less". Carroll, Through the Looking Glass, Chapter 6.

is one which would make a person hesitate to act. See Holland v United States, 348 U.S. 121, 140 (1948) and United States v Richardson, 504 F2d 357, 361,f.n. 9 and 10 (5th Cir., 1974) for a partial list of cases.

Both the government and counsel for a co-defendant had submitted proposed instructions on reasonable doubt formulated in the 'hesitate to act' language.* The trial court had ruled pursuant to Rule 30, F.R.Cr.P., prior to summations, that these requests were granted in substance. (T.3652, 3675)**

The entire summation by Palatta's counsel was keyed to the 'hesitate to act' standard, which the court had twice stated it would give in its charge. (See especially T.3796, 3797,*** 3798, 3799, 3800, 3801, 3808, 3809, 3825) Magnano's counsel specifically relied upon the summation of Palatta's counsel in that respect. (T.3845)

The charge the trial court gave on reasonable doubt, however, contained no"hesitate to act" definition. (T.4044-46, A.32-34) Instead, the court charged in the 'moral certainty'-'willing to act' language which has been universally condemned. United States v Hart, 407 F2d 1087, 1091 (2nd Cir., 1969). (T.4046, A.34)

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* Government Request No. 2a and DeLutro Request 2. (A.134 and 133) As was stated above, motions, etc., by one defendant inured to the benefit of all similarly situated. (supra, p. 13, f.n.)

** The government indicated that its position was identical with respect to the DeLutro request on hesitate to act. (T.3675) Counsel for a co-defendant asked that the government language be changed from "hesitate to act in matters of importance in your daily lives" to "'matters of serious importance in your daily lives' to impress upon the jury the very serious task with which they are engaged". (T. 3652)

*** "I suggest to you -- and this is important -- if you would hesitate -- remember that word -- if you would hesitate to take their word -- you saw them both -- if you would hesitate to rely on them, as I suggest you must, then you must entertain a reasonable doubt in this case. It is as simple as that.

MR. AMOROSA: I am going to object to statements with respect to the law. (cont'd next page)

Counsel took specific exception to the court's reasonable doubt charge, and the court refused to change it.*/

In every case arising in this Circuit since the Supreme Court decision in Holland v United States, supra, the court has stated that a reasonable doubt definition in terms of something the jury would act upon creates confusion, and that the hesitate to act definition is the proper and preferred language. United States v Bilotti, 380 F2d 649, 654 (2nd Cir., 1967); United States v Nuccio, 373 F2d 168, 174-175 (2nd Cir., 1967); United States v Hart, supra; United States v Acarino, 408 F2d 512, 517 (2nd Cir., 1969).

The reason for holding that the 'hesitate to act' language should be charged is succinctly put by Judge Skelly Wright in Scurry v United States, 347 F2d 468, 470 (D.C. Cir., 1965):

> "Being convinced beyond a reasonable doubt cannot be equated with being "willing to act * * * in the more weighty and important matters in your own affairs." A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary.
>
> The jury, on the other hand, is prohibited from convicting unless it can say that beyond a reasonable doubt the defendant is guilty as charged. Thus there is a substantial difference between a

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***/ (Cont'd from previous page)
MR. GOLDBERG: I didn't tell the law.
THE COURT: No, objection overruled. He is arguing. The law will be given to the jury by the court. He is just arguing there isn't sufficient evidence to prove his client guilty beyond a reasonable doubt." (Emphasis added.) (T.3797)

*/ "MR. GOLDBERG: . . . The defendant Palatta excepts to your failure to charge in the negative, that a reasonable doubt is such a doubt as would cause the jury to hesitate to act in matters of importance in their own lives.
THE COURT: The exception is noted. The court will stand on the charge as given." (T.4122)

> juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him. To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt."

The erroneous giving of the 'willing to act' charge was overlooked in the above cited cases because exceptions were not taken in any of them.

In this case, proper exception was taken, and the error cannot be disregarded as harmless -- not only because, as this Court stated upon finding error in a reasonable doubt charge in United States v Guglielmini, 384 F2d 602, 607 (2nd Cir., 1967), ". . . we do not know how experienced and sophisticated each of the jurors may be in these matters; and we can never know just what words or thoughts are remembered and become the guides which weigh most heavily in the jury's deliberations," but also because the reasonable doubt charge never gave a legally acceptable definition of that term, and hence was not substantially correct taken as a whole.

The court began by asking:

> "What does the law mean by reasonable doubt? How much evidence does the government have to place before the jury to convict?" (T.4044, A.32)

The jury was then told that the government did not have to present evidence beyond any possible doubt. (T.4045, A. 33), that the doubt must be "substantial", and that a "defendant is not to be convicted on suspicion, conjecture or even impressive evidence which does not rise to the dignity of significant persuasiveness." (T.4045, A.33)

By injecting the 'substantial doubt' and 'evidence . . . of significant persuasiveness' phrases into its definition, the court

committed errors found reversible in other cases.

In United States v Alvero, 470 F2d 981 (5th Cir., 1972), the court reversed where the trial court's reasonable doubt definition included the phrase, 'a very substantial doubt'; and in United States v Bridges, 499 F2d 179 (7th Cir., 1974), the court reversed where the instruction contained the phrase, 'a substantial doubt'. The reason for disapproving the 'substantial doubt' phrase was ably articulated in State v Davis, 482 S.W.2d 486, 490 (S.Ct.Mo., 1972):

> "'Reasonable' and 'substantial' are not synonymous, as can be seen by referring to any of the standard dictionaries. The point was well put by counsel in argument recently where he stated that if one had to undergo a serious operation and were querying the doctor as to the prospects for a successful outcome, how differently the person would feel if the doctor told him there was only a reasonable chance of success as opposed to being told there was a substantial chance of success."

Not only was the jury told that a reasonable doubt was a substantial doubt, but the court -- after posing the question as to the amount of evidence the government needed to present to convict -- cast the burden in terms of evidence rising to a level of "significant persuasiveness", as contrasted to evidence giving rise to suspicion or conjecture, or even impressive evidence. This is even a lesser burden than proof by a preponderance of the evidence. The use of the latter phrase in a reasonable doubt instruction, in United States v Crescent-Kelvan Co., 164 F2d 582, 588 (3rd Cir., 1948), was held reversible error; c.f., United States v Hughes, 389 F2d 535, 537 (2nd Cir., 1968), where the court condemned the use of language in a reasonable doubt charge which "gave an erroneous impression of the standard of proof to be used in a criminal case".

The court then equated reasonable doubt and moral certainty, in two confusing paragraphs. (T.4045-46, A.33-4) The jury was first told that a reasonable doubt was the equivalent of not having an abiding conviction of guilt amounting to a moral certainty (T.4045, A.34); and then told that an abiding conviction of guilt amounting to a moral certainty was "such conviction or certainty as you would be willing to act upon in your own private lives . . .". (T.4046, A. 35)

In five cases in this Circuit, United States v Hart, supra, United States v Acarino, supra, United States v Boccio, supra, United States v Byrd, 352 F2d 570 (2nd Cir., 1965), and United States v Johnson, 343 F2d 5, 6 (2nd Cir., 1963), the Court has condemned the use of the "ambiguous term 'moral certainty' in its many variations". United States v Byrd, supra, at 575.

Here the judge used the disapproved and ambiguous 'moral certainty' language in the equally disapproved 'willing to act' form of charge -- adding to it the 'abiding conviction' language disapproved by the Court in United States v Barrera, 486 F2d 333, 339 (2nd Cir., 1973).

Whatever force the 'moral certainty' language may have in other contexts was totally depleted here when the court stated it was "such conviction or certainty as you would be willing to act on in your private lives" -- without even adding the limiting qualification 'in matters of importance in your private lives', much less the 'matters of serious importance' qualification that had been requested by the defense. (supra, p. 22, f.n. **)

The charge also contained cautions to the jury that reasonable doubt ". . . is not an excuse to avoid the performance of an unpleasant duty". (T.4045, A. 33), and that "If the rule were you had to be satisfied beyond all possible doubt few men, however guilty they might be, would ever be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any contraverted fact which by its very nature is not susceptible of mathematical certainty". (T.4046, A.34)

The 'excuse to avoid performance of a duty' language was disapproved in United States v Andrews, 347 F2d 207, 212 (6th Cir., 1965) as "it seems to us to place the court in the position of urging a verdict with more emphasis than is appropriate". As for the portion on not being able to convict the guilty if the standard of proof were higher, language very similar to this was a basis for reversal in United States v Bridges, supra, 499 F2d at 186, and was disapproved in United States v Shaffner, 524 F2d 1021, 1023 (7th Cir., 1975) because it clearly "favors the government on the issue of reasonable doubt".

It cannot be said that the reasonable doubt charge, taken as a whole, was substantially correct, and hence that the erroneous portion excepted to below can be overlooked as harmless error. In fact, given the degree to which the entire charge on reasonable doubt was permeated with error, a reversal would be warranted under Rule 52(b) even in the absence of exception.

In addition, in granting the requests to charge the 'hesitate to act' formulation before summation, then refusing to charge

the jury in the proper manner even after specific exception, the court violated Rule 30 in a manner substantially affecting the content of counsel's summation, further adding to the prejudice suffered by the appellants from the erroneous instruction. United States v Crescent-Kelvan Co., supra, 164 F2d at 589; c.f., Wright v United States, 339 F2d 578 (9th Cir., 1964), and United States v Mendoza, 473 F2d 697 (5th Cir., 1973).

As we stated above, counsel's entire summation was keyed to the 'hesitate to act' standard, which the court stated it would charge. The court permitted him to argue in this fashion, while making it clear to the jury that the legal standard for assessing reasonable doubt would be given in the court's charge. (supra, p.22, f.n.***)

The "obvious object of [Rule 30] is to require the judge to inform the trial lawyers in a fair way what the charge is going to be so that they may intelligently argue the case to the jury". Wright v United States, supra, at 580. Here defense counsel began his argument with an understanding that the reasonable doubt charge would be given in terms of 'hesitate to act', although the record shows that the trial judge's later action was to refuse to give the charge in this form, even after proper exception. c.f. United States v Mendoza, supra, 473 F2d at 701. It cannot be said "that this did not impair the effectiveness of counsel's argument and hence of appellant's defense". Wright v United States, supra. In accord, United States v Crescent-Kelvan Co., supra, 164 F2d at 589, where the Rule 30 error found prejudicial also involved the reasonable doubt charge.

For this further reason, the erroneous charge on reasonable doubt must be considered prejudicial error affecting substantial rights of the appellants and the conviction must be reversed.

(b) The accomplice instruction

Magnano and Palatta were convicted only because the jury credited the testimony of Perna and Verzino.

Perna and Verzino were major narcotics offenders facing life imprisonment on fully documented narcotics transactions, who were motivated to testify only because they did not want to spend the rest of their lives in prison.*/ This motivation does not disqualify such witnesses any more than the interest of a defendant in the outcome of a case bars him from taking the stand. It is, however, a most significant factor for the jury to consider in assessing the credibility of such testimony; just as the defendant's interest is a most significant factor in assessing the credibility of his testimony.

In this case, the defense asked for a strong cautionary instruction on accomplice testimony, in the language of United States v Padgent, 432 F2d 701, 704 (2nd Cir., 1970), in addition to the usual 'care and caution' charge, just as the government requested

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*/ Their testimony implicating Magnano and Palatta was not corroborated by any independent source, even though the government had gotten their stories a year before trial and despite intensive surveillance of them by government agents for months before their arrests. (T.3803-05) While corroboration is not a legal prerequisite for a conviction, it is not without legal significance. United States v Masino, 257 F2d 129 (2nd Cir., 1960)

a strong cautionary instruction on the credibility of the two defendants who testified.*/ The accomplice instruction requested by the defense was not given, over further exception,**/ whereas the instruction requested by the government on a testifying defendant's credibility was given. (T.4101-3, A.89-91; T.4112, A.100) The contrast between the measures given by the court for assessing the credibility of accomplices and defendants was objected to by counsel for one defendant who took the stand on a ground equally relevant to Magnano and Palatta -- that when weighing one against the other, "the defendant comes off much the poorer, although the accomplice has an equal motive to falsify". (T.4124-25; A.112-13)

The exception was valid for the non-testifying defendants as well because the court had instructed the jury:

> ". . . counsel have emphasized the corruptibility of Perna and Verzino, and well they might. However, you do not consider [their] testimony . . . in a vacuum, as it were. It is to be estimated, assessed, and evaluated in conjunction with all the other evidence in the case, <u>including the testimony of the two defendants who took the stand</u>. (T.4035, A. 23) (Emphasis added)

Thus the court made it clear that the central issue in the case as to Magnano and Palatta -- the credibility of Perna and Verzino -- was to be determined in conjunction with the jury's evaluation of the testimony of the two defendants who took the stand.***/

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*/ Bolella Request #1, DeLutro Requests #10 and 11; (A.131;133); Govt. Request #27 (A. 135) given although the testifying defendants requested another charge (DeLutro Request #12).

**/ ". . . I take exception to your Honor's accomplice charge, to your Honor's instruction to the jury on how to treat accomplice testimony. Your Honor should have instructed them as in <u>United States v Padgent</u>, as set forth in my original request." (T.4127)

***/ See also Point V , infra.

We submit that given the court's charge on a defendant's credibility that:

> ". . . it is the law that interest creates a motive to give false testimony, that the greater the interest the stronger the temptation, and that the interest of a defendant in the result of a trial is of a character possessed by no other witness . . .". (T.4112, A. 100),

it was error to refuse to give the equally strong charge requested by the defense on how the law views the equally suspect interest of accomplices. We are aware of the holding in United States v Bermudez, — F2d — (2nd Cir., October 6, 1975) Slip Opin. 441, 455, that the Padgent language need not be routinely charged, even where specifically requested. However, we believe that where the "credibility issue was indeed the whole case . . . it [is] essential for the trial judge to present evenly balanced instructions as to the possible bias of both government and defense witnesses". United States v Reid, 410 F2d 1233, 1227-28 (7th Cir., 1969): and that, as in Reid, "the instructions given, in conjunction with the refusal of [the defense instruction] presented an unbalanced picture to the jury which was, on the special facts of this case, prejudicial error". If the government has a right to a strong cautionary instruction on a defendant's interest in testifying, so must a defendant have the right to a charge on the equally strong self-interest of witnesses like Perna and Verzino.

In this case the cautionary charge on a defendant's interest in testifying was stated in the strongest terms; whereas the few cautionary words on accomplice testimony were nullified by the Court's

simultaneous instructions on the necessity of using accomplice testimony and its gratuitous and unfounded remarks on the frequency of finding truth from sources wherein it is least expected.

The jury was told that the fact that "government witnesses are accomplices or have criminal records is to be carefully considered by you as bearing on their credibility". (T.4101, A.89) In the next breath, the court took away what it gave, by charging it is to be expected that such witnesses will not be upright gentlemen; that the government frequently must use witnesses who are accomplices; that just because one is an acknowledged participant in a crime does not mean he is capable of giving a truthful version of what occurred; and stating:

> "As with courage, so it is with truthfulness. It frequently comes from the most unlikely sources. Those from whom we rightfully expect the truth very often we find it not forthcoming, and those from whom we would hardly expect it, from them sometimes a veritable avalanche of convincing disclosure gushes forth.
>
> The testimony of such persons, however, must be viewed with caution, must be scrutinized with the utmost circumspection." (T.4101-02, A.89-90)

The court then instructed that while elements like self-interest, personal advantage, hostility do not nullify the testimony of accomplices, those elements should be considered, as well as whether the testimony was a fabrication induced by a promise or belief of favorable consideration. (T.4102-03, A.90-91)

In United States v Lee, 506 F2d 111, 118 (D.C. Cir., 1974), the court cautioned:

> ". . . Even a Federal judge must take care lest his instruction oversteer members of a jury in fact, notwithstanding a general disclaimer that theirs is the fact function. And although a Federal judge necessarily draws on his personal experiences when a case is tried to a court, as in assessment of demeanor, he does not have free range to translate these into instructions for the jury, as appears from Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). What seems evident to one judge, based on his experience, may be questioned by another; and instructions to the jury, which deal with the law, are properly confined to propositions that reflect the wisdom of the community— an instance of judicial notice translated into an instruction."

The wisdom of this caveat is evident in this case.

By injecting into the accomplice instruction what seemed evident to the court based on his experience -- that truth frequently comes from those unlikely sources we least expect to receive it -- the court gave the jury the exact opposite basis for appraising accomplice testimony than that which the law actually recognizes. As was stated in United States v Lee, supra, 506 F2d at 119:

> ". . . an accomplice's own 'confession of soul' carries a 'ring of truth' and it is, indeed, this circumstance that impels the court to caution the jury on the dangers of accomplice testimony. The need for careful scrutiny of an uncorroborated accomplice reflects the danger, underscored by experience, that he may be giving a false account to secure lenient treatment."

One of the most basic requirements for a fair trial is that the trial court should provide a fair and balanced perspective as a

context for deliberation, not singling out a witness or a class in such a way as to give undue weight to one party or the other. The instructions on credibility did not do so in this case. Here the instructions on accomplice credibility gave the jury a legally and factually unfounded basis to disregard the inherent suspicion with which the law views such testimony. When this instruction is contrasted with the instruction on a testifying defendant's credibility, it is clear that the net result was unfairly to strengthen the government's position*/ that Perna and Verzino were telling the truth, and to cast doubt upon the reliability of the other testimony contradicting them. c.f. Reid v United States, supra, 410 F2d at 1228.

The reasonable doubt and accomplice instructions were the two portions of the charge most important to the theory of appellant's defense. They both contain substantial error, properly preserved by objection, affecting appellant's substantial rights. For this reason, their convictions must be reversed and a new trial ordered.

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*/ The court's charge on the use of informants, given over objection (T.3659), also contained personal embellishments which buttressed the government position in this respect:

> "I don't mind including this -- that the representatives of the government to use informants sometimes take their lives into their hands. It takes courage to deal so often with these despicable characters in order to know where the fire is going on and where the rot exists and where the cash or the secret hiding places can be found. You are not going to go look for it; someone has to. The question is, what was done here in this case? Was it done with that kind of high motive or was it not? Was there pollution that runs amuck here, or is it confined? Or is there any, really, when you come to add up all the evidence?" (T.4115, A.103)

POINT II

The Trial Court's Refusal to Grant a Hearing to Determine if a New Trial Should Be Ordered, Because of Post-Verdict Brady Disclosures by the Government, Was Clearly Erroneous.

Three weeks after the verdict, the government produced three statements by Perna given after his recapture from the West Street escape, establishing that he first gave false information about his confederates in the escape, and later admitted he lied to the government in order to conceal and protect members of his family, friends and associates. (A.163) Their importance to the defense case lay in the fact that the government had minimized its disclosure that Verzino had lied to the government after he began cooperating -- which had been used to great advantage by the defense -- by arguing that this was irrelevant since Perna had cooperated in full after his recapture. (supra, p. 14) The belated disclosure was the basis for a motion for a hearing to determine whether a new trial should be granted. (A.136 et seq.) The only explanation for non-disclosure given by the government was:

> "I became aware of the existence of these three statements on November 8, 1975, approximately two weeks after the verdict. These three statements were in possession of another Assistant United States Attorney prior to September 22nd, the date upon which the trial commenced." (A.168-69)

The trial court found, without an evidentiary hearing, that:

> ". . . the contents of these statements became known to the Assistant United States Attorney in charge of the prosecution approximately two weeks after the verdict when he thereupon informed the court and all counsel of their existence, and that there was no deliberate suppression of these materials on the part of the government." (A.178)

The court further found that there was not a significant chance the statements could have produced a different result at trial, for, if of value at all, they were only cumulative on the issue of credibility, and had no bearing on whether or not the defendants were guilty. (A.179)

We submit that the evidence before the court was insufficient to satisfy the government's burden in the issue of culpability, and hence the court's finding that there was no deliberate suppression was clearly erroneous. United States v Miranda, — F2d — (2nd Cir., December 3, 1975), slip opin. 6545, 6560.

The threshhold issue in a case like this is whether the prosecutor has intentionally suppressed evidence, or intentionally ignored evidence whose high value to the defense could not have escaped his attention, or merely acted inadvertently or negligently. United States v Morell, 524 F2d 550, 553 (2nd Cir., 1975); United States v Hilton, 521 F2d 164, 166 (2nd Cir., 1975). This determination must be made because the standards governing the grant of a new trial vary according to the government's culpability. Ibid.

The fact that the statements were in the possession of another assistant in the same office should have been the beginning, not the end, of the inquiry.*/ Giglio v United States, 405 U.S. 150, 154 (1972) established that a prosecutor's office will be treated as an entity for disclosure purposes, and cautioned that large offices should establish procedures to insure communication of all relevant

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*/ Moreover, as defense counsel noted in the Rule 33 motion, the statements bore "a partly obliterated exhibit tag", indicating they had been in the government's possession a full year before the trial and been used either in matters before the District Court or before a grand jury. (A.141-42) The prosecutor never disclosed where the documents had been used as exhibits.

information on each case to every lawyer who deals with it.

Before making a factual finding on the government's culpability, the Court should have taken evidence on why the prosecutor failed to discover the existence of these particular statements after a defense demand for disclosure of all materials bearing on the credibility of witnesses was made*/, especially since the prosecutor had obtained and turned over similar material relating to Verzino's credibility.

Why was the material relevant to Verzino's initial cover-up of his sources in the Stassi case located though presumably in the custody of another assistant, but the material relevant to Perna's cover-up in the West Street escape not discovered until after trial?

Did the prosecutor make any effort to determine whether the evidence in the possession of the government did in fact support his argument to the jury that Perna had been co-operating in full with the government since his recapture?

Did the prosecutor have an obligation to determine the correctness of his position on Perna's full co-operation after recapture before he elicited such statements from Perna and so argued to the jury? For in light of Perna's false statements after the escape, the prosecutor's questioning of Perna and his summation conveyed a position fundamentally at odds with actual fact.

On cross, Perna was asked whether he ever lied after swearing to tell the truth (T.1049) and ultimately admitted he would lie to protect his friends. (T.1121-22) On redirect, the prosecutor repaired

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*/ Palatta's pre-trial motion for Bill of Particulars, demand C (pp. 7-8) for materials bearing on credibility.

the damage by eliciting from Perna that he now intended to tell the truth, as evidenced by the fact that he named all his sources in the Atlanta conspiracy and was scheduled to be a witness in that trial. (T.1350-58) Perna was specifically asked, "Subsequent to your recapture, did you agree to cooperate with the government in full?", and received an affirmative answer. (T.2860) The prosecutor used this incorrect testimony to tremendous advantage in summation. (supra, p. 14)

Additionally, the argument and trial court's position on the material showing that Verzino lied about his confederates in the Atlanta conspiracy after he began co-operating with the government, necessarily put the prosecutor on notice that any similar statements from Perna were of critical importance to a proper jury assessment of his credibility*/.

Giglio, supra, makes it clear that when the reliability of a given witness is critical to a determination of guilt or innocence, non-disclosure of evidence affecting credibility falls within the Brady v Maryland, supra, rule. The Third Circuit has recently held that where the impeachment information withheld by the government tends to impair seriously the reliability of the very witnesses whose testimony carries the case to the jury, than a new trial should be granted whether the withholding was deliberate or inadvertent. United States v McCrane, — F2d — (3rd Cir., December 18, 1975, No. 75-1643)

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*/ That Verzino lied on the Atlanta conspiracy came in through stipulation (T.3642-43) even though the defense had failed to question Verzino about it when he was on the stand, because of its high significance to the case. (T.3416-27; 3428-33)

Given the fact that the prosecutor chose to portray Perna to the jury as the witness who could be believed because he had co-operated in full after his recapture -- despite the existence of information in his own office which proved the falsity of this portrayal -- the trial court should have resolved the issue of prosecutorial culpability for the non-disclosure only after an evidentiary hearing where all the facts were established. United States v Hilton, supra, 521 F2d at 167. The trial court's determination that no hearing was necessary was clearly erroneous, and a remand for such a hearing should be ordered by the Court, with directions for resolution of the materiality question only after the threshold culpability issue is resolved.

POINT III

It Was Prejudicial Error To Preclude Appellants From Introducing Into Evidence Proffered Government Reports Supporting Their Defense; and To Refuse Their Request To Charge Under Dyer v MacDougall, supra.

The defense twice attempted to introduce into evidence government reports containing information relevant to its theory of the case. (supra, pp. 14-16) The first offer was of government reports containing Perna's statements to the informant Condella about his fear of "heat" after Malizia's arrest, and was made when the agent who prepared the reports testified. (T.1546-55) The information in the reports was offered to prove that Perna's motive to falsify existed prior to his arrest and his February statement. (T.1548) Counsels' arguments that the reports, though hearsay, were admissible under Rule 803 F.R.E. and on the state of mind hearsay exception were rejected.

The defense had attempted, with minimal success, to obtain admissions from Verzino that several times during the conspiracy Verzino told a co-conspirator, Culhane, he had gotten his narcotics from a French source. (supra, p. 16) The basis for the questions was government reports containing Culhane's statements to this effect. (T.2288) The reports also stated that Verzino admitted to Culhane that he killed a witness for Malizia -- which Verzino had denied. (T.2295-99) During the questioning, the court had instructed that the fact the exhibit for identification existed was immaterial, for without the witness' admission, "the question is worthless, and is entitled to absolutely no weight." (T.2296)

The Culhane material was offered through the officer who prepared it, pursuant to Rule 803, F.R.E. (T.2695-96) Decision was reserved and no questions of the witness to establish what Culhane told him were permitted. (T.2698; 2893) The offer was ultimately rejected on the grounds the statements were inadmissible hearsay.*/ (T.3074-81)

The reports should have been admitted into evidence as a hearsay exception.

The well-established rule in this and other circuits is that police reports are admissible as business record exceptions to the hearsay rule. United States v Smith, 521 F2d 957-963 (D.C. Cir., 1975) for citation of cases so holding.**/ Hearsay contained in such reports is also admissible "if it was reported to the maker, directly or through others, by one who is himself acting in the regular course of business, and who has personal knowledge." Smith, supra, 521 F2d at 964.

Thus under the business record exception of Rule 803, F.R.E., the hearsay of both Culhane and Condella contained in the reports was admissible, since they were both government informants with personal knowledge acting in the regular course of business, unless barred

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*/ The government's arguments against admissibility were that Culhane and Condella were in government custody and could be called by the defense (T.1550;3074-75); there were no factual findings in the reports (T.3079); and that Culhane was unreliable despite the fact that Sgt. Rollo had sworn he was a reliable informant. (T.3075-77) There was no claim by the government that Condella was unreliable or had reported the conversations with Perna inaccurately. (T.1554-55)

**/ The Smith is cited throughout as it is a treatise on the police report exception, containing comprehensive citations to all available authority.

because of the source of information indicated a lack of trustworthiness under the Palmer v Hoffman (318 U.S. 109 (1943)) exception. Smith, supra, at 965-66.

The prosecution never claimed that Condella was untrustworthy. (supra, p.40 , f.n.) The Palmer doctrine was, therefore, no bar to the admission of the reports containing his statements and it was error to exclude them.

The prosecution claimed that Culhane was generally unreliable. But this only goes to the weight of the statement, not its admissibility. Smith, supra, at 965 n. 19. The Palmer exception only excludes as untrustworthy, "records prepared with an eye towards litigation when offered by the party responsible for making the record". Smith, supra, at 965-68. Thus the government's claim -- that the informant, who was reliable enough when it came to using his information to secure a search warrant was now unreliable -- was not a bar to admission of the document; first because the government did not claim that the report was made as a "litigation record", and second, because it was not being offered by the party responsible for making the record.

Exclusion of these documents from evidence cannot be disregarded as harmless error.

The court had refused to give the Dyer v McDougall, supra, instruction requested by the defense -- that a negative credibility assessment of Perna and Verzino could cause the jury to infer that the truth was the opposite of their denials.* By precluding the jury from finding that the truth was opposite of Perna's and Verzino's

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*/ The requested instruction is reproduced at A. 132. The court denied the request at T.3681.

denials, and by also excluding valid evidence tending affirmatively to establish the opposite of the denials, the court effectively precluded the defense from establishing its claim that the government witnesses were concealing their true source of heroin and had fabricated a story after Malizia's arrest and before Perna's, falsely implicating Palatta and Magnano.

Moreover, refusal to give the Dyer instruction was also error as this Court has long recognized that a jury can draw the negative inferences in a criminal case. United States v Geaney, 417 F2d 1116, 1121 (2nd Cir., 1969); United States v Tropiano, 418 F2d 1069, 1075 (2nd Cir., 1969). This was not a case where the party having the affirmative of the issue might be successful in convincing a trier of fact of his case by denials, yet would have a verdict set aside on appeal if based solely on demeanor evidence. United States v Cisnerus, 448 F2d 298, 306 n. 10 (9th Cir., 1971); c.f. United States v Jenkins, 510 F2d 495, 499 (2nd Cir., 1975). Moreover, ever if it can be said that Jenkins requires the appellants -- who are under no burden to offer affirmative proof -- to come forward with some independent evidence of their contentions before being entitled to the Dyer instruction, then the trial court's improper exclusion of such affirmative evidence in the government records was doubly prejudicial.

Exclusion of proof properly offered tending to establish the defense claims that Perna and Verzino falsely implicated appellants, combined with the court's refusal to charge that the jury could infer the opposite of their denials under Dyer, supra, was prejudicial error in this case.

POINT IV

Introduction and Use of Evidence Establishing a Sustained Course of Dealings in Narcotics Between the Government Witness Verzino and the Appellants Ten Years Before the Conspiracy Alleged in the Indictment Serving No Purpose Except to Prove Criminal Character was Prejudicial Error.

The prosecution may introduce other crimes evidence only if it is substantially relevant for some other purpose than to show a probability that the accused committed the crime on trial because he is a man of criminal character. McCormick, Evidence, #157, p. 327.*/ The government's argument in support of its offer of other crimes evidence against Magnano and Palatta, and the use made of it during trial and in summation, establishes that even under this most liberal rule, the evidence served no other purpose than to prove appellants' criminal character.

The government's position below was that Verzino's other crimes testimony would establish "that these defendants were engaged with Verzino over a long period of time in the distribution of narcotics . . .". (T.713)**/ The evidence was offered to establish intent

> "but also with regard to a plan or common pattern of conduct over the years . . . we have to concede that assuming Perna is believed there is not going to be a question here with respect to intent . . . these prior similar acts show a course or pattern of conduct begun prior to the allegations in the indictment . . .". (T.716-17)

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*/ This inclusive form of the rule is followed in this Circuit, rather than the 'exclusionary' form where such evidence is excluded unless relevant to establish certain narrow exceptions such as motive, intent, etc. 2 Weinstein's Evidence, pp. 404-42.

**/ See also supra, pp. 16-18 and T.1863-71.

The court ruled the evidence "irrelevant on the question of intent . . .", but admissible "to show the background and development of a conspiracy . . .". (T.722)

The initial difficulty, as the defense below stated in objection, is that:

> "A continuing pattern of criminal behavior, if we really stripped the verbiage from it, tends to demonstrate the defendant is the kind of person who has committed crimes similar to the one he is on trial for, and I don't think you will find any case that justifies permitting the prosecution to prove other crimes just to show that this is the kind of defendant whom the jury can expect will have committed this crime because he has committed other crimes for five or ten years much like this line." (T.705)

And, indeed, the line between prior criminal acts to prove background of the conspiracy and to prove a pattern of criminal conduct never could be drawn at the trial.

Not only do the court's attempts at giving limiting instructions show this,*/ but the government's understanding of why the prior crimes evidence was admitted demonstrates the equally great confusion the lay jury must have experienced in dealing with this testimony.

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*/ See especially T.761, where after posing the question as to why "prior matters, prior arrangements before the acts embraced within the indictment" are permitted, and admonishing that they were not admitted to show "a similar course of conduct . . ." or that "the conspiracy with which we are dealing . . . was a continuation of some other plan or conspiracy" or that "they did this on a prior occasion . . . and, therefore, they must have done it here", or to show that "these are bad people", the court instructed:

> "Then why do you let it in, Judge? Because the law says that if the evidence deals with a continuation of a common scheme or plan that evidence may be received to show that it was a part of a common plan or scheme, and you are allowed to go into the background and the development of the conspiracy before you."

The government continued to insist that it was offering Verzino's testimony to show ". . . one continuous course of conduct . . . identical with the conduct charged here . . ." (T.1966; also T. 1819-20)

When the court protested that the government was "advancing an entirely different and dangerous position, that is the behavior pattern of an individual . . ." rather than conduct to show the existence of the conspiracy (T.1967), the government responded, "I think, Judge, we are saying the same thing in different words". (T.1968; 1969)

The evidenc served no legitimate role in the case, and its introduction into evidence was error for the following reasons:

First, as was recognized in United States v Apollo, 476 F2d 156, 160 (5th Cir., 1973), where the government sought to justify proof of major deals in marijuana six months after the conspiracy and importing offense for which the defendant stood trial on the same theory:

> ". . . we consider . . . the government's assertion that the probity of this proof lays in its tendency to show a pattern or scheme of conduct. The problem for this theory is that [the defendant] was not on trial for being a marijuana pusher but for illegally importing the weed into the United States."

Second, as the defense argued (T.710), the common scheme- or plan background cases are ones where the evidence proves preparation (1 Wharton's Criminal Evidence #242) or an interrelated series of criminal acts occurring so near together in time and so similar in means to lead to the logical inference they are mutually dependent and a product of the same deliberate purpose. Wharton,

supra, #248. The incidents here, as the defense argued (T.705, 711), were too remote in time to justify their use for either purpose. See Lloyd v United States, 226 F2d 9, 18 (5th Cir., 1955); Lambert v United States, 101 F2d 960, 964 (5th Cir., 1939); Boyer v United States, 132 F2d 12, 13 (D.C. Cir., 1942); Wolcher v United States, 200 F2d 493, 497-8 (9th Cir., 1952); Bullard v United States, 395 F2d 658 (5th Cir., 1968), all holding the prior crimes evidence too remote to have relevance on such issues.

Third, under the government's own theory and presentation of the case, Verzino's dealings with Palatta and Magnano ten years before the indictment were not the background to the conspiracy. As the facts show (supra, p. 18), the criminal relationship Verzino testified he had with Palatta and Magnano in the 1940's and between 1960 and 1965 was not the background and development of the 1973 conspiracy because those past criminal dealings did nothing whatsoever to bring Perna and Malizia together with Palatta and Magnano in 1973.

The final proof that Verzino's testimony of the pre-1973 narcotics between him and the appellants was introduced solely so the jury could infer propensity was the government's argument about what the prior crimes evidence proved in this case. (T.3751-52, quoted supra, p. 18)

Defense counsel's motion for a mistrial on the ground that

> ". . . this prosecutor injected . . . an attack directed on the criminal character of the defendants. The court permitted prior acts only to show the development of this conspiracy, but in no way permitted any proof that would permit the prosecutor to comment that these defendants have lived their lives as scummy and as awful [as] those lived by these witnesses who testified on the stand. That . . . is an attack on the character of these defendants and is also improper." (T.3777)

was well taken and the mistrial should have been granted.

The trial court had already recognized the overwhelming prejudice in the prior crimes testimony and the danger that any further embellishment by the prosecutor would nullify its cautionary instructions on the limited use of that evidence. (supra, p. 17) Moreover, this was the second time after stringent admonition from the trial court, that the prosecutor overstepped the court's limits on the prior crimes evidence. (supra, p. 17)

As in United States v DeCicco, 435 F2d 478, 482 (2nd Cir., 1970), the prior crimes evidence tended to show that Magnano and Palatta were in the business of selling heroin, despite the trial court's cautionary instructions. Here as in DeCicco, the evidence had no relevance to any issue in the case and the appellants were prejudiced by its introduction and by the unwarranted inference from the evidence -- which the prosecutor asked the jury to draw -- that the past association of Verzino and Magnano and Palatta proved they were all men of the same criminal ilk. Reversal is warranted on this basis.

POINT V

The Government's Proof Established Three Separate Conspiracies, Not The Single Conspiracy Charged In The Indictment

In this joint trial, Magnano and Palatta were tried together not only with customers of Perna and Verzino, but also with other persons whom Perna and Verzino testified were their suppliers -- Anthony Soldano and Anthony DeLutro -- despite pre-trial severance motions and motions to dismiss during trial on the ground that the evidence proved more than the single conspiracy charged in the indictment. (T.3603, see 2803 for argument by counsel for Magnano.)

Perna and Verzino testified that they began to deal with DeLutro and Soldano after it became clear that Magnano and Palatta could not supply their partnership with pure heroin. (supra, pp. 7 and 8) Verzino testified that once they obtained pure heroin from DeLutro, he and Malizia were unwilling to take new supplies from Palatta and Magnano. (T.1930-31; 1997) The testimony further showed that Palatta expressed anger that Malizia and Verzino had paid the new suppliers instead of settling their accounts with him and Magnano (T.767), and because they were taking other heroin rather than moving the merchandise they had taken from him. (T. 1999) There was no evidence that Palatta and Magnano, or any of the persons Perna and Verzino named as their partners, knew DeLutro or Soldano, or that the Malizia-Perna-Verzino partnership was able to use its relationship to Palatta and Magnano to facilitate its purchase of heroin from either DeLutro or Soldano, or to obtain credit from them. In fact, while

Perna and Verzino had initially dealt on a credit basis with Palatta and Magnano, they were required to pay DeLutro and Soldano simultaneously with the transfer of the heroin.

In United States v Tramunti, 513 F2d 1087, 1106 (2nd Cir., 1975), this Court held that proof by the government of sales to a common distributor alone would not prove a single conspiracy. In Tramunti, supra, at 1106, the Court found that in addition to such proof the government also adduced sufficient proof of mutual dependence and assistance between the two supplier groups to warrant treatment of the two spheres as one general business venture. The fact that Barnaba, the hub conspirator, could move between the two groups with ease, facilitated by social contacts between them, indicated that they were not "independent competitors". Moreover, at first, he could only obtain goods on a cash basis with the Inglese faction, thereafter was able to get them on consignment from DiNapoli. The Court found that "this may be taken as evidence of mutual trust and co-operation between the operations and indicative of the link between them". (Ibid.)

In United States v Mallah, 503 F2d 971, 976 (2nd Cir., 1974), the Court found that while the conspirators often moved in two groups, there were other sufficient indications of a criminal partnership, including common direction from Sperling and Pacelli, the leaders of those groups, comingling of assets, mutual dependence and common business offices. And in United States v Sperling, 506 F2d 1323, 1330 (2nd Cir., 1974), the link between the Pacelli and Sperling organizations was found from the fact that each group acted both as the customer and supplier of the other.

In this case, the only link between Magnano and Palatta, on the one hand, and DeLutro and Soldano, was merely that they made sales to a common distributor -- the Perna-Malizia-Verzino partnership. None of the elements present in Tramunti, Sperling or Ma[illegible] from which the inference of a mutuality of interest between the suppliers was established, was present in this case. On the contrary, all evidence from the government's own witnesses proved that Palatta and Magnano were in fact independent competitors, whose ability to do business with Perna and Verzino -- the common distributors -- was not only not aided, but was severly impaired by Verzino's development of DeLutro and Soldano as superior, superceding sources of supply.

In this case, as in United States v Bertolotti, et al., — F2d — (2nd Cir., November 10, 1975), slip opin. 6409, 6423, "under the guise of its single conspiracy theory the government subjected each of the [defendants] to voluminous testimony relating to unconnected crimes in which he took no part". The trial lasted five weeks, and over half of it related to testimony of Perna's and Verzino's dealings with DeLutro and Soldano, including evidence of prior criminal dealings between DeLutro and Verzino (T.1993-94), and with the DeLutro defense.

By joining the appellants Palatta and Magnano together with DeLutro and Soldano, despite the fact that there was no evidence to show any conspiratorial relationship between them, the appellants were deprived of their "right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others".

United States v Bertolotti, supra, slip opin. at 6424. On the central issue in the case -- the credibility issue -- the jury was instructed that Perna's and Verzino's veracity was to be assessed in conjunction with all the evidence in the case, including the testimony of the defendants who took the stand. (T.4035, A.23) DeLutro had corroborated many of the details testified to by Perna and Verzino concerning their meetings with him,[*] though he denied that the meetings were to effect a sale of heroin. Thus by the joint trial the government reaped the benefit -- not only of the spill-over prejudice from testimony proving transactions unrelated to Palatta and Magnano recognized in Bertolotti, supra, at 6424 -- but also of corroboration by a mis-joined co-defendant of Perna's and Verzino's credibility, and the court's instruction that the jury could consider his testimony not only as to his own guilt, but also in determining the guilt of Magnano and Palatta.

The trial court in this case expressed doubt as to whether the jury would be able to separate the evidence as to each defendant, and to accord each defendant the separate determination of his own guilt or innocence which he is entitled to by law. (T.3802-2806) We submit that the joint trial of three unrelated conspiracies, together with substantive counts insufficiently connected to justify joinder, prejudiced the rights of Palatta and Magnano to a fair trial.

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[*] DeLutro confirmed that he had known Verzino for fifteen years (T.3221), and that he twice met with Perna and Verzino, during the period alleged in the indictment, at the bars where they testified he conspired with them. (T.3225-30) He also confirmed that he introduced them to a woman named Trixie (T.3227-28), whose phone number Verzino had in his possession when arrested. (T.2081)

POINT VI

Introduction Into Evidence Against Appellants of the $585,000 in Cash Seized at the Home of a Co-Defendant Eleven Months After the Termination of the Conspiracy, the Possession of Which Was Not Shown to be Connected in any Way to the Conspiracy Charged, was Prejudicial Error.

No item of real evidence can be received unless a proper foundation has been laid for its admission.*/ The connection must be made to appear, or else the whole offer fails. Wigmore, Evidence, #2129, p. 564. This is especially so "when a corporeal object is produced as proving something", for there is a general mental tendency to assume, on sight of the object, all else implied in the case about it. The sight of it seems to prove all the rest". Wigmore, supra, #2129, p. 565.**/

The prosecution was permitted to introduce $585,000 in cash, found at the home of a co-defendant eleven months after the termination of the conspiracy, to corroborate Perna's and Verzino's testimony that they participated in a narcotics conspiracy -- not only with

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*/ "Objects or things offered in evidence do not generally identify themselves. Accordingly, the demonstrative evidence must first be authenticated by the testimony of a witness who testifies to facts showing that the object has some connection with the case which makes it relevant." McCormick, Evidence, #179, p. 384.

**/ Wigmore gives this example:

> "Thus, it is easy for a jury, when the witness speaks of a horse being stolen from Doe by Roe, to understand when Doe is proved to have lost the horse, that it still remains to be proved that Roe took it: the missing element can clearly be kept separate as an additional requirement.
>
> But if the witness to the theft were to have a horse brought to the courtroom, and to point it out triumphantly, 'If you doubt me, there is the very horse,'

(cont'd)

Lucas -- but also with Magnano and Palatta, as the evidence came in against all defendants on trial. (T.2897)*/ We submit that its admission against the appellants Magnano and Palatta, over objection, was error. The prosecution produced no evidence connecting Lucas' possession of the money, eleven months after the arrest of the only links between him and the appellants, to the conspiracy charged in the indictment. Moreover, any connection between the Lucas money and this conspiracy was totally shattered when the prosecution admitted the same money was going to be introduced into evidence in another conspiracy trial where the appellants were not charged.

From the beginning of the trial, the defense had argued that the Lucas money was not connected to the conspiracy charged and should not be admitted into evidence. (T.369)**/ The government alleged it connected the money seized in January, 1975, to the 1973-1974 conspiracy by the testimony of Perna and Verzino that Lucas had been dealing in tremendous amounts of cash "during the course of this conspiracy which ran from April, 1973, to the time these people were

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**/ (cont'd)
this would go a great way to persuade the jury to ignore the weakness of his evidence of Roe's complicity. The sight of the horse, corroborating in the flesh, as it were, a part of the witness' testimony, tends to verify the remainder." Wigmore, supra, #2129, p. 565.

*/ The $585,000 was physically brought into court and exhibited to the jury. (T.2964-73)

**/ ". . . there is nothing to show this money is connected with this case. There has been testimony . . . in other cases . . . identifying Mr. Lucas as being a member of a syndicate headed by Mr. Magrone, as being a customer of one Albert Rossi and seeking to obtain from Mr. Rossi allegedly large quantities of heroin for substantial sums of money, several hundred thousand dollars. Mr. Lucas is also indicted in another case . . . . This money will keep cropping up in each one of these various cases. I think in the absence of any nexus to show specifically that the money is tied into this case . . . this evidence will have a prejudicial effect upon every defendant who sits in this courtroom . . . ."

arrested, Verzino being the last arrested on February 25, 1974"; and the testimony that when Verzino was arrested, Lucas still owed the Verzino-Perna-Malizia partnership over $300,000. (T.2771) The legal authority relied on was United States v Tramunti, 531 F2d 1087 (2nd Cir., 1974). According to the government, finding the money in Lucas' home a year after the conspiracy terminated, corroborated Perna's and Verzino's testimony that while the conspiracy was in progress they received hundreds of thousands of dollars from Lucas (T.2772) -- or, in Wigmore's words, 'if you doubt me, there is the very horse'. This evidence established "the guilt of everyone . . . charged in the conspiracy count". (T.2772)

The fallacy of the government's argument was pointed out by counsel below.

There was nothing in the record to show that the money was possessed by Lucas in 1975 for a purpose connected with the conspiracy. (T.2775) The evidence had established that after Perna et al. were arrested, they had no real expectation they would receive any money they claimed Lucas owed them. (T.2775; T.1326) Moreover, the evidence also showed that whatever amount Perna and Verzino felt was owed to them by Lucas, they had no intention of giving any of that money to Palatta and Magnano. Verzino testified he stopped meeting Palatta and Magnano in January of 1974 because he didn't want to pay them any further money. (T.2009) Both Perna and Verzino testified that they attempted to collect the money Lucas owed "for our lawyers fees and for our families". (T.886; T.2005-06) When $25,000 was collected in

the spring of 1974, it was split between Malizia and the two men who were arrested with Perna, for lawyers fees. (T.911-12) Thus, far from establishing, as the government contended, that Lucas was holding the money to give to his co-conspirators on another day (T.279), the evidence actually showed that after the Perna-Malizia-Verzino arrests, there was no further activity concerning money, from which it could be inferred Lucas was still holding money for payment to Verzino and Perna a year after the conspiracy terminated; or that Perna and Verzino attempted to collect any money from Lucas on behalf of Magnano and Palatta or for any purpose connected to the conspiracy. (T.2779)

Absent such proof, there was nothing to connect the Lucas' possession of the money a year after the conspiracy terminated to the criminal activities occurring the previous year. For the long lapse of time between Lucas' possession of the money and the termination of the conspiracy distinguishes this case from United States v Tramunti, supra, and renders its rationale of admissibility inapplicable here.

In Tramunti, supra, the money introduced at trial was found in the possession of a defendant while the conspiracy was in full swing. It was admitted because possession by a defendant of the means to commit the crime charged during the time the criminal activity allegedly occurred was evidence from which the jury could infer that the crime was, in fact, committed. But it does not follow that proof a defendant possessed the means to commit a crime at some remote time is similarly probative.

Proof that a person possessed a screwdriver and hammer during the time it is alleged that he and others conspired to burglarize houses does tend to demonstrate a likelihood that such a conspiracy did in fact exist; whereas proof that a defendant had such tools a year after the last burglary occurred is possession too remote in time to warrant the same inference. This is especially so where, as here, the potential for prejudice from the evidence is erroneous. For, whether or not connected to this conspiracy, possession of this large amount of cash tended to prove that Lucas was a narcotics dealer; just as possession of burglar's tools not connected to the crime charged tends to prove that a defendant is a burglar. Evidence which merely shows general criminal propensity, but having no other relevance, must be excluded since it has no legitimate role in a criminal case.

The Lucas money had no legitimate role in this case, as its connection to the conspiracy charged in the indictment was never established. Its potential for prejudice was enormous since it tended to show general criminal propensity and therefore its receipt into evidence was prejudicial error.

The final proof that the Lucas money had no connection to this case is that when offered, the government acknowledged it also planned to use this same evidence in another narcotics case where Lucas, but none of the other defendants, was charged. (T.2850-51)

Defense counsel had argued that it was unfair to permit the government to use the money which could not be traced to any other defendant on trial, in all cases where Lucas was also a defendant. (T.2782-84) They further argued that counsel should be advised:

> ". . . under the concept of Brady . . . if the government intends to or has presented to the grand jury evidence tending to link this $500,000 to another conspiracy in connection with other defendants . . . because it contravenes the government's theory in this case that this money is chargeable against these defendants . . . . " (T.2787)

The court initially agreed that if the government "is inclined to use this same piece of evidence with regard to other conspiracies, then . . . that shakes the contention of the government that this money is related to the conspiracy with which we are concerned". (T.2788) On being advised that the same evidence would be offered in another trial, the court subsequently found that it was immaterial that some of this money may also have been related to other conspiracies. (T.2854-55)

We submit that the government should not be permitted to take an inherently incriminating piece of evidence and sprinkle it indiscriminately in case after case on the theory that it has some arguable relevance to all of them. Either the evidence was connected to this case, or it was connected to the second case[2] where it was also introduced. But it is prejudicially unfair to draw indictments permitting use of the evidence in both. For if Lucas' dealings in the two cases overlapped to the degree that it was impossible to determine which case the money actually belonged in, then, as counsel argued below, the government drafts the indictments and Lucas should have been tried alone. (T.2780-81) For this further reason, admission of the money into evidence in this case was prejudicial error.

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[2] United States v Tutino, 75 Cr. 1038.

POINT VII

The Appellants Adopt the Points of Other Counsel Applicable to Them Pursuant to Rule 28(i), F.R.A.P.

CONCLUSION

The government's case against Magnano and Palatta was sufficient or non-existent depending upon the jury's assessment of the credibility of Perna and Verzino. Every error occurring below was properly preserved by objection and had substantial, improper impact upon that credibility determination. Singly and in combination they cannot be disregarded as harmless in the circumstances of this case. The judgments appealed from must therefore be reversed, and a new trial ordered, as well as a hearing to determine prosecutorial culpability in failing to disclose Brady material.

Respectfully submitted,

GRETCHEN WHITE OBERMAN
Counsel for Appellants
Magnano and Palatta

Dated: New York, New York
March , 1976

~~XRAXXXXXEAMMANN~~ OBERMAN USA v. Magnano

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 18 day of March , 1976 at No. 1 St. Andrews Pl., NYC deponent served the within Brief upon U.S. Atty. the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 18 day of March 1976

Edward Bailey

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976